In the Supreme Court of the United States.

October Term, 1899.

Original, No. ——.

EX PARTE: IN THE MATTER OF THE APPLICATION OF RAMON BARZ.

BRIEF FOR THE UNITED STATES.

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STATEMENT.

Ramon Baez, a native-born inhabitant of Puerto Rico, applies for leave to file a petition for writs of habeas corpus and certiorari to secure his release from further imprisonment under a judgment of the United States provisional court of Puerto Rico sentencing him "to be confined for a period of two months" (transcript, p. 10) for illegal voting at a municipal election held under a military order, the sentence afterwards being "remitted" to "imprisonment to thirty days at hard labor" (transcript, p. 11). The prayer is that the writ of habeas

corpus be directed to Samuel C. Bothwell, marshal of the provisional court, at Humacoa, Puerto Rico, commanding him to produce Baez before this court, and that the writ of certiorari issue to the provisional court of Puerto Rico commanding it to forward to this court a transcript of its proceedings in this case.

The following facts are material in the consideration of the application:

(1) Prior to the cession of Puerto Rico the island was under the rule of Spain. The civil law obtained. The jury system contemplated by our Constitution was unknown. In a modified form the jury system exists today in Spain, but had never been extended to Puerto Rico (Walton's Civil Law in Spain and Spanish America, ed. 1900, p. 498).

(2) Under the protocol of August 12, 1898, the United States occupied Puerto Rico, and on October 18, 1898, General Brooke, in compliance with the orders of the President, assumed command and, by General Orders, No. 1, established the Department of Puerto Rico. Since that time the government of the island has been conducted by the President, through the War Department, awaiting the action of Congress with respect to its future disposition and government.

(3) On April 11, 1899, ratifications were exchanged and the Treaty of Paris proclaimed. By this treaty Spain ceded to the United States the island of Puerto Rico. (Article II.) Spanish subjects, natives of the peninsula, residing in Puerto Rico, were given one year from the exchange of the ratifications—that is, until

April 11, 1900—to preserve their allegiance to Spain by making a declaration in a court of record. In default of the declaration within the year they are to be held "to have adopted the nationality of the territory in which they may reside." (Article IX.) The power of determining the "civil rights and political status of the native inhabitants" of Puerto Rico was reserved to Congress. (Article IX.)

(4) On June 27, 1899, by General Orders, No. 88, the United States provisional court for the Department of Puerto Rico was established. This was a military tribunal or commission, composed of a law judge, an American lawyer, and two associate judges, officers of the Fifth Cavalry, with an officer as clerk and a trooper as marshal.

(5) On September 21, 1899, by General Orders, No. 145, provisions for municipal elections held under military authority were made. After defining the qualifications of voters, the order provided:

> Any person who fraudulently votes, or attempts or offers to fraudulently vote, at any public election, shall, upon conviction thereof, be subjected to a fine not exceeding $100 or to imprisonment at hard labor not exceeding three months, or to both such fine and imprisonment, at the discretion of the court.

These elections were held under military authority for experimental and educational purposes.

(6) Under these orders a municipal election was held at Guayama on October 31, 1899. Baez admits in his petition (p. 10) that he "voted at said election." An information was filed charging him with having voted

illegally. He was tried before the provisional court without a jury, convicted and sentenced (petition, p. 13) "to imprisonment at hard labor in the jail of Humacao, Puerto Rico, for a period of thirty days." The thirty days began to run on March 16, 1900.

ARGUMENT.

I.

Is this military court and its trooper marshal within the territorial jurisdiction of this court? Both are in Puerto Rico. While that island has been ceded to the United States, Congress has as yet taken no action toward organizing the territory or applying to it the Constitution and the laws of the United States. The island has been acquired under the power conferred by the Constitution on the Government of the Union of making war and of making treaties (Marshall, C. J., in *Insurance Co.* v. *Canter*, 1 Peters, 511, 541). The ultimate disposition and government of territory thus acquired rests with Congress under the power granted it—

> To dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States. (Article 4, section 3.)

Congress has not yet acted. The President is therefore still in control, acting through the War Department. The occupation is a military occupation. The so-called courts are the mere agencies of the military power. Everything is provisional and temporary. The Department of Justice of the United States is not in operation

in Puerto Rico. No provision whatever has been made for extending the judicial power of the United States over Puerto Rico. The island has not been erected into a separate judicial district, nor has it been included in any existing judicial district. The only officers there are military officers. They exercise military power and are subject to review and correction by military authority alone. The language of Mr. Chief Justice Taney in *Jecker* v. *Montgomery* (13 How., 498, 515) applies:

> The courts established or sanctioned in Mexico during the war by the commanders of the American forces were nothing more than agencies of the military power, to assist it in preserving order in the conquered territory, and to protect the inhabitants in their persons and property while it was occupied by the American arms.

II.

The court has no jurisdiction of the case presented. Baez makes application for writs of habeas corpus and certiorari, certiorari to bring before the court the record of this military court and habeas corpus to discharge him from its sentence. Is it necessary to cite authorities upon the point that the jurisdiction of this court is conferred and limited by the Constitution and laws of the United States? "Every court of the United States," said Chief Justice Taney (13 How., 515), "must derive its jurisdiction and judicial authority from the Constitution or the laws of the United States." Parties can not by stipulation confer upon this court jurisdiction in a case where neither the Constitution nor the laws confer jurisdiction. Nor can a military officer do so by general

orders. The attempt of the general in command of Puerto Rico to confer upon this court jurisdiction to review by writ of certiorari the decisions of the military tribunal established by his order was, of course, futile.

An original application is made to this court for a writ of habeas corpus. My understanding of the rule is that the court will not issue the writ of habeas corpus except under its appellate jurisdiction—in other words, except when it has power to review the action of the court under whose judgment the prisoner is held (*Ex Parte Hung Hang*, 108 U. S., 552). Obviously the court can not issue a writ in this case under its appellate jurisdiction, for it has no authority to review the action of this military commission (*In the Matter of Metzger*, 5 How., 176, 190; *Ex Parte Vallandigham*, 1 Wall., 243, 253; *Ex Parte Mason*, 105 U. S., 696).

In *Ex Parte Milligan* (4 Wall., 2) the application was made in the first instance to the circuit court, and the case came before this court on a certificate of division.

III.

The petitioner relies on the fifth and sixth amendments, but the guarantees for a grand jury and a petit jury provided in these amendments only operate where the crime charged is an infamous one. Unless Baez satisfies the court that voting illegally at a municipal election held under a military order is an infamous crime, his prayer must be denied. Has he done so?

It is to be noted that Baez admits he voted. He therefore voluntarily brought himself within the military order

and of his own accord subjected himself to its penalties. The general in command said to the Puerto Ricans, You may participate in the government entrusted to me upon certain conditions, but if you violate these conditions I will punish you. Baez accepted the boon, he must bear the burden; he enjoyed the privilege, he must pay the price. It does not lie in his mouth to say there was no law for the election. If there was law enough to make it worth his while to vote, there was law enough to punish him for voting illegally.

Was the crime an infamous one? To vote illegally is not in itself an infamous crime. Did the punishment prescribed make it so? This punishment was "a fine not exceeding $100 or imprisonment at hard labor not exceeding three months, or both." This is the punishment ordinarily inflicted for a misdemeanor. It is not infamous punishment. Imprisonment at hard labor is only infamous when it means imprisonment in a State jail or penitentiary (*In re Mills*, 135 U. S., 263; *Ex parte Weston*, 114 U. S., 417). Imprisonment at hard labor under this order simply means imprisonment in what we call a county jail. No civil disability or other infamous result followed. Practically all misdemeanors are punished by imprisonment at hard labor in the sense in which the term is used in this military order. If a prisoner is confined in a county jail he is liable to be put on the road; if in a workhouse, to do whatever task may be assigned him.

In Puerto Rico, according to the report of General Davis for 1899 (page 31), there is a penitentiary at Ponce, and five jails, to one of which, that at Humacoa, Baez

was sentenced to imprisonment. In the penitentiary at Ponce shops are being installed for the manufacture of goods. Men sentenced to imprisonment in the jails of Puerto Rico are required to do work on the roads and do police work in the towns and cities. I understand that Baez is doing work on the roads. This is not "an infamous task." It is the task of ordinary offenders everywhere; I might add, of citizens, for in Ohio every man is required by law to do two days' work on the road every year.

IV.

The provisions of the fifth and sixth amendments requiring an indictment by a grand jury and a trial by a petit jury do not and can not apply to Puerto Rico at the present time, while under military rule and before Congress has provided a form of government. The operation of these guarantees contemplates the existence of the Anglo-Saxon machinery of criminal procedure. You can not have an indictment unless you have a grand jury and you can not have a grand jury unless you have the machinery to select and the material to select from. You must have a civil government and a citizenship determined by law. Neither exists in Puerto Rico to-day. Neither can exist until Congress has acted. It is for Congress to determine the civil rights and political status of the inhabitants of Puerto Rico, and who shall be citizens can not properly be determined until after the 11th of April next, because the Spanish residents have until that time to decide whether they choose to retain their allegiance to Spain or become citizens of the island.

I have already pointed out that the jury system has never been in operation in Puerto Rico. A modified jury system has been in operation in Spain, but it was not extended to Puerto Rico. The people of Puerto Rico have had no experience in the administration of the Anglo-Saxon jury system. The right to be indicted by a grand jury and tried by a petit jury was not possessed by the people of Puerto Rico before the cession, did not pass by the cession, and the treaty itself expressly provides that the civil rights and political status of the inhabitants shall be determined by Congress.

It is a strange contention that as soon as the treaty went into effect the power of the President to preserve order in Puerto Rico ceased. There were no grand juries, no petit juries, no machinery for punishing crime by the processes of the Anglo-Saxon law, and yet, according to the argument of the other side, crime could be punished in no other way. The Constitution which gave the United States the power to acquire territory by treaty, and imposed upon Congress the duty of disposing of and governing it, did not leave the President helpless in the meantime by demanding impossibilities. Until Congress provides for courts and juries in Puerto Rico these guarantees of the Constitution must be held inoperative or the preservation of peace and order and the protection of life and property by the President be abandoned. The situation resembles that discussed in the case of *In re Ross* (140 U. S., 453), where a conviction of murder by a consular court in Japan, acting without a jury and simply upon information, was sustained.

Mr. Justice Field, speaking for the court, said, referring to these guarantees (bottom page 464):

> And, besides, their enforcement abroad in numerous places where it would be highly important to have consuls invested with judicial authority would be impracticable from the impossibility of obtaining a competent grand or petit jury. The requirement of such a body to accuse and to try an offender would, in a majority of cases, cause an abandonment of all prosecution.

The requirement of the sixth amendment that the trial shall be "by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law," shows of itself that the amendment was not intended to apply in the case of unorganized territory, acquired by treaty and held under temporary military occupation awaiting Congressional action.

The provision of article 3, section 2, requiring that the trial by jury shall be held "in the State where the crime shall have been committed, but when not committed within any State the trial shall be at such place or places as the Congress may by law have directed," is plainly inapplicable, because this offense was not committed in a State, and there is no law of Congress directing where the trial of offenses committed in Puerto Rico shall be had.

V.

The constitutional guarantees relating to grand and petit juries have but a limited operation. They do not apply to the States (*Maxwell* v. *Dow*, 176 U. S., p. ——).

They do not tie the hands of the inhabitants of a Territory when organizing a State, nor do they tie the hands of the President in preserving order and protecting life and property pending the action of Congress in organizing newly acquired territory. The court has recognized in the clearest way that trial by jury is not always and everywhere the best mode of trial. It has held not only that the people who organize a State may do away with indictment by a grand jury and trial by a petit jury in criminal cases, but that the legislature of a State may by law abolish trial by jury in some counties and continue it in others (*Missouri* v. *Lewis*, 101 U. S., 21, 31). I quote what this court, speaking by Mr. Justice Brown, said in the recent case of *Holden* v. *Hardy* (169 U. S., 366), because it has an almost prophetic application to the situation in Puerto Rico (p. 389):

> In the future growth of the nation, as heretofore, it is not impossible that Congress may see fit to annex territories whose jurisprudence is that of the civil law. One of the considerations moving to such annexation might be the very fact that the territory so annexed should enter the Union with its traditions, laws, and systems of administration unchanged. It would be a narrow construction of the Constitution to require them to abandon these, or to substitute for a system which represented the growth of generations of inhabitants a jurisprudence with which they had had no previous acquaintance or sympathy.

JOHN K. RICHARDS,
Solicitor-General.

APRIL 2, 1900.

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